



MERIT SYSTEMS PROTECTION BOARD

5 CFR Parts 1201 and 1210

Practices and Procedures; Appeal of Removal or Transfer of Senior Executive Service Employees of the Department of Veterans Affairs

AGENCY: Merit Systems Protection Board.

ACTION: Interim final rule.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) hereby amends its rules of practice and procedure to adapt the Board's regulations to legislative changes that have created new laws applicable to the removal or transfer of Senior Executive Service employees of the Department of Veterans Affairs.

DATES: This interim final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Submit written comments concerning this interim final rule on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments concerning this interim final rule by one of the following methods and in accordance with the relevant instructions:

Email: mspb@mspb.gov. Comments submitted by email can be contained in the body of the email or as an attachment in any common electronic format, including word processing applications, HTML and PDF. If possible, commenters are asked to use a text format and not an image format for attachments. An email should contain a subject line indicating that the submission contains comments concerning the MSPB's interim final rule. The MSPB asks that parties use email to submit comments if possible. Submission of comments by email will assist MSPB to process comments and speed publication of a final rule.

Fax: (202) 653-7130. Faxes should be addressed to William D. Spencer and contain a subject line indicating that the submission contains comments concerning the MSPB's interim final rule.

Mail or other commercial delivery: William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW., Washington DC 20419;

Hand delivery or courier: Should be addressed to William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M

Street, NW., Washington, DC 20419, and delivered to the 5th floor reception window at this street address. Such deliveries are only accepted Monday through Friday, 9 a.m. to 4:30 p.m. Eastern Time, excluding Federal holidays.

Instructions: As noted above, MSPB requests that commenters use email to submit comments, if possible. All comments received will be included in the public docket without change and will be made available online at the Board's Web site, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information or other information whose disclosure is restricted by law. Those desiring to submit anonymous comments must submit them in a manner that does not reveal the commenter's identity, include a statement that the comment is being submitted anonymously, and include no personally-identifiable information. The email address of a commenter who chooses to submit comments using email will not be disclosed unless it appears in comments attached to an email or in the body of a comment.

FOR FURTHER INFORMATION CONTACT: William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street,

NW., Washington, DC 20419; phone: (202) 653-7200; fax: (202) 653-7130; or email: *mspb@mspb.gov*.

SUPPLEMENTARY INFORMATION:

This interim final rule is necessary to adapt the MSPB's regulations to recent amendments to Federal law contained in section 707 of the Veterans' Access to Care through Choice, Accountability, and Transparency Act of 2014, Public Law 113-146 (the Act). The Act was signed by the President on August 7, 2014, and took effect on that same date.

Summary of Section 707 of the Act

The sole provision of the Act relevant to this interim final rule is section 707. Paragraph (a) of section 707 of the Act creates a new statute, 38 U.S.C. 713, which sets forth new rules for the removal or transfer of Senior Executive Service employees of the Department of Veterans Affairs (covered SES employees) for performance or misconduct and requires expedited review of such actions by the MSPB. Under 38 U.S.C. 713(a), the Secretary of the Department of Veterans Affairs may remove or transfer a covered SES employee if the Secretary determines that the covered employee's performance or misconduct warrants such action. Covered employees have a right to

appeal a removal or transfer to the MSPB pursuant to 38 U.S.C. 713(d)(2)(A) and 5 U.S.C. 7701. Such an appeal must be filed with the MSPB within 7 days after the date of the removal or transfer. 38 U.S.C. 713(d)(2)(B). Review of the removal or transfer must be undertaken by an MSPB administrative judge, and a decision must be issued by the MSPB administrative judge within 21 days after the appeal is filed. 38 U.S.C. 713(e). If a decision is not issued within 21 days, the Secretary's decision is final. 38 U.S.C. 713(e)(3). An administrative judge's decision shall not be subject to further appeal. 38 U.S.C. 713(e)(2).

Paragraph (b) of section 707 of the Act requires the MSPB to develop and to put into effect expedited procedures for processing appeals filed pursuant to 38 U.S.C. 713 within 14 days of passage of the Act, specifies that 5 CFR 1201.22 is not applicable to appeals filed under 38 U.S.C. 713, and authorizes the MSPB to waive any other regulation to provide the expedited review required under 38 U.S.C. 713. Paragraph (b) also requires the MSPB to submit a report to Congress within 14 days that addresses the steps the Board is taking to conduct the expedited review required under the Act. The report must

also identify any additional resources the Board determines to be necessary to complete expedited reviews.

The MSPB currently plays an important role in protecting the rights of our nation's veterans by adjudicating appeals filed under the Veterans Employment Opportunities Act and the Uniformed Services Employment and Reemployment Rights Act. In addition, the Board Members and MSPB employees, including a significant number of veterans, support any comprehensive legislation that improves conditions for our nation's veterans. Nevertheless, the MSPB has concerns regarding the constitutionality of section 707 of the Act. Specifically, the MSPB questions the constitutionality of any provision of law that prohibits presidentially-appointed, Senate-confirmed Officers of the United States Government from carrying out the mission of the agency to which they were appointed and confirmed to lead.

Justification for Interim Final Rule Effective Immediately

Ordinarily, the Administrative Procedure Act (APA) requires an agency to provide notice of proposed rulemaking and a period of public comment before the promulgation of a new regulation. 5 U.S.C. 553(b) and (c). However, section 553(b) of the APA

specifically provides that the notice and comment requirements do not apply:

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. The APA also requires the publication of any substantive rule at least 30 days before its effective date, 5 U.S.C. 553(d), except where the rule is interpretive, where the rule grants an exception or relieves a restriction, or "as otherwise provided by the agency for good cause found and published with the rule." Id.

A finding that notice and comment rulemaking is unnecessary must be "confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." Mack Trucks, Inc. v. Env'tl. Prot. Agency, 682 F.3d 87, 94 (D.C. Cir. 2012). The Board finds that publication of this interim final rule effective upon publication is warranted for several reasons. The procedures created

in Part 1210 reflect changes that have already been enacted into law by the Act. Komjathy v. National Transp. Safety Bd., 832 F.2d 1294, 1296-97 (D.C. Cir. 1987) (notice and comment unnecessary where regulation does no more than repeat, virtually verbatim, the statutory grant of authority); Gray Panthers Advocacy Comm. v. Sullivan, 936 F.2d 1284, 1291-92 (D.C. Cir. 1991) (no reason exists to require notice and comment procedures where regulations restate or paraphrase the detailed requirements of the statute).

The Act took effect upon signature by the President. Given the extremely limited time within which the Board was required to implement procedures to accommodate the expedited review required under the Act, the Board finds that good cause exists to publish these amendments to its regulations in an interim final rule that is effective immediately. The Board finds that this expedited rulemaking is necessary to reduce potential confusion among appellants and agency representatives caused by outdated regulations and ensure that procedures are in place to facilitate the expedited case processing required under the Act. Philadelphia Citizens in Action v. Schweiker, 669 F.2d 877, 882-84 (3d Cir. 1982) (finding good cause to dispense with notice and comment where Omnibus Budget Reconciliation Act

amendments enacted by Congress became effective by statute on a specific date, shortly after enactment).

Summary of Amendments

Section 1201.3 is amended to add 38 U.S.C. 713 to the list of sources of MSPB appellate jurisdiction.

Section 1210.1 sets forth the MSPB's authority to issue decisions under 38 U.S.C. 713 and notes several relevant provisions of that statute.

Section 1210.2 defines several words and terms used in part 1210.

Section 1210.3 addresses the applicability of 5 CFR part 1201 to appeals filed under part 1210.

Section 1210.4 repeats the Act's provision allowing the Board to waive any MSPB regulation to provide the expedited review required by the Act.

Section 1210.5 sets forth certain items that must be included in an agency notice of removal or transfer issued pursuant to 38 U.S.C. 713.

Section 1210.6 requires parties to use the MSPB e-filing system (e-Appeal Online), observe filing procedures ordered by the

administrative judge, and check frequently to see whether additional pleadings or orders have been added to the e-Appeal Online Repository.

Section 1210.7 addresses the appropriate place for filing appeals, time limits for filing an appeal and a response, and time limits for filing appeals not covered under part 1210.

Section 1210.8 repeats the Act's provision prohibiting an administrative judge from granting a stay request in an appeal covered under part 1210.

Section 1210.9 requires the appellant to include the agency's decision notice and response file with the initial appeal.

Section 1210.10 states that motions challenging the designation of a representative must be filed within 3 days of notification of the identity of the representative.

Section 1210.11 sets forth procedures for initial status conferences, including scheduling, issues likely to be addressed, and the possibility of scheduling additional conferences. This regulation also recognizes the administrative judge's discretion in addressing these matters.

Section 1210.12 requires initial disclosures, sets forth discovery procedures, and notes the administrative judge's authority to alter discovery procedures.

Section 1210.13 requires the filing of non-discovery motions within 5 days of the initial status conference and allows 2 days for filing an opposition. This regulation recognizes the administrative judge's authority to alter these deadlines.

Section 1210.14 advises the parties that administrative judges have the authority to impose sanctions for failure to meet deadlines or obey orders. The regulation also makes clear that deadlines will be strictly enforced due to the statutorily-required expedited nature of appeals under part 1210.

Section 1210.15 repeats the Act's provision requiring the agency to provide such information and assistance as are required to expedite the processing of appeals under part 1210. This regulation also requires the agency to advise the MSPB when it takes an action under 38 U.S.C. 713.

Section 1210.16 states that intervenors and amici curiae are permitted to participate in appeals under part 1210, that motions to intervene and requests to participate must be filed at the earliest

possible time, and that intervenors and amici curiae must comply with the expedited procedures applicable to appeals under part 1210.

Section 1210.17 addresses an appellant's right to a hearing under 5 U.S.C. 7701, hearing procedures, and the responsibility of the MSPB to ensure the presence of a court reporter.

Section 1210.18 addresses burdens of proof, standards of review, and review of penalties.

Section 1210.19 contains procedures for the issuance of bench decisions.

Section 1210.20 states that decisions by an administrative judge under this part are effective upon issuance and may be cited as persuasive authority in other appeals under part 1210 (but may not be cited in appeals not filed under part 1210). This regulation also states that the MSPB retains jurisdiction following the issuance of a decision under part 1210 for purposes of enforcement of decisions and orders and attorney fees, witness fees, litigation expenses and damages.

List of Subjects in 5 CFR Parts 1201 and 1210

Administrative practice and procedure.

Accordingly, for the reasons set forth in the preamble, the Board amends 5 CFR parts 1201 and 1210:

PART 1201—PRACTICES AND PROCEDURES

1. The authority citation for 5 CFR part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204, 1305, and 7701, and 38 U.S.C. 4331, unless otherwise noted.

2. Section 1201.3 is amended by revising paragraph (a)(10) to read as follows:

§ 1201.3 Appellate jurisdiction.

(a) * * *

(10) *Various actions involving the Senior Executive Service.* Removal or suspension for more than 14 days (5 U.S.C. 7543(d) and 5 CFR 752.605); Reduction-in-force action affecting a career appointee (5 U.S.C. 3595); Furlough of a career appointee (5 CFR 359.805); Removal or transfer of a Senior Executive Service employee of the Department of Veterans Affairs (38 U.S.C. 713 and 5 CFR part 1210); and

* * * * *

3. Add a new part 1210 to read as follows:

**PART 1210 -PRACTICES AND PROCEDURES FOR AN
APPEAL OF A REMOVAL OR TRANSFER OF A SENIOR
EXECUTIVE SERVICE EMPLOYEE BY THE SECRETARY OF
THE DEPARTMENT OF VETERANS AFFAIRS**

Sec.

1210.1 Authority to issue decisions under this part.

1210.2 Definitions.

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1210.5 Determination of the Secretary effecting a removal or transfer; required notice of expedited procedures; initial disclosures.

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1210.17 Hearings.

1210.18 Burden of proof, standard of review, and penalty.

1210.19 Bench decisions.

1210.20 Effective date of a decision issued by an administrative judge; continuing jurisdiction over certain ancillary matters.

Authority: 5 U.S.C. 1204 and 7701, and 38 U.S.C. 713.

§ 1210.1 Authority to issue decisions under this part.

(a) Under 38 U.S.C. 713(d)(2)(A), as created by the Veterans Access, Choice and Accountability Act of 2014 (the Act), an employee covered by this part may appeal a removal from the civil service or a transfer to a General Schedule position based upon performance or misconduct to the MSPB.

(b) MSPB administrative judges have the authority to issue a decision in an appeal covered by this part. (38 U.S.C. 713(e)(1)).

(c) The administrative judge's authority under this part to issue a decision terminates following the passage of 21 days after the appeal is initially filed. (38 U.S.C. 713(e)(3)).

(d) An administrative judge's decision in an appeal filed under this part is not subject to any further appeal. (38 U.S.C. 713(e)(2)).

(e) This part applies only to the Secretary's authority to remove or transfer an employee covered under 38 U.S.C. 713 and the Board's authority to review such decisions. This authority is in addition to the authority already provided the agency in 5 U.S.C. 3592 and the authority provided the Board under 5 U.S.C. 7541, *et seq.* to take an adverse action against an employee. (38 U.S.C. 713(f)).

§ 1210.2 Definitions.

(a) The term *employee covered by this part* means an individual (a career appointee as that term is defined in 5 U.S.C. 3132(a)(4) or an individual who occupies an administrative or executive position and is appointed under 38 U.S.C. 7306(a) or 7501(1)) employed in a Senior Executive Service position at the Department of Veterans Affairs. (38 U.S.C. 713(a) and (g)).

(b) The term *administrative judge* means a person experienced in hearing appeals and assigned by the Board to hold a hearing and decide an appeal arising under this part. (38 U.S.C. 713(e)(1)).

(c) The term *response file* means all documents and evidence the Secretary of the Department of Veterans Affairs, or designee, used in

making the decision to remove or transfer an employee covered by this part. It also may include any additional documents or evidence that the agency would present in support of the Secretary's determination in the event that an appeal is filed.

(d) The term *misconduct* includes neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function. (38 U.S.C. 713(g)(2)).

(e) The term *transfer* means the transfer of an employee covered by this part to a General Schedule position. (38 U.S.C. 713(a)(1)(B)).

§ 1210.3 Application of practices and procedures to appeals filed under this part.

(a) The following provisions of part 1201 of this chapter are inapplicable to appeals filed under this part:

(1) Section 1201.22 (inapplicable to appeals brought under this part pursuant to Pub. L. 113-146, section 707(b)(2));

(2) Section 1201.27 (class appeals are not allowed as such appeals cannot be adjudicated within 21 days);

(3) Section 1201.28 (case suspensions are not allowed because they are inconsistent with the requirement to adjudicate appeals under this part within 21 days);

- (4) Section 1201.29 (dismissals without prejudice are not allowed because those procedures are inconsistent with the requirement to adjudicate appeals under this part within 21 days);
- (5) Section 1201.56 (this regulation is not controlling; parties should refer to §1210.18);
- (6) Sections 1201.91 through 1201.93 (interlocutory appeals are not allowed because the Board lacks authority to review appeals filed under this part);
- (7) Sections 1201.114 through 1201.20 (petitions for review are not allowed because the decisions in appeals filed under this part are not subject to further appeal) (38 U.S.C. 713(e)(2));
- (8) Sections 1201.121 through 1201.145 (procedures for other original jurisdiction cases are not relevant to appeals filed under this part);
- (9) Sections 1201.152, 1201.153(b), 1201.154, 1201.155, 1201.156, 1201.157, and 1201.161 (these provisions are inapplicable to appeals filed under 38 U.S.C. 713).
- (b) Except as modified by this part, the remaining relevant provisions of part 1201 of this chapter are applicable to appeals filed under this part.

§ 1210.4 Waiver of MSPB regulations.

The Board may waive any MSPB regulation in order to provide for the expedited review of an appeal covered by this part. Pub. L. 113-146, section 707(b)(3).

§ 1210.5 Determination of the Secretary effecting a removal or transfer; required notice of expedited procedures; initial disclosures.

An agency notice of a removal or transfer pursuant to 38 U.S.C. 713 must include the following:

- (a) A statement identifying the action taken based on the Secretary's determination, stating the factual reasons for the charge(s), and statement setting forth the basis for the Secretary's determination that the performance or misconduct warrants removal or transfer.
- (b) Notice regarding the Board's expedited procedures applicable to an appeal. Such notice shall include a copy of this part and access to the remainder of the Board's adjudicatory regulations.
- (c) A copy of the materials the Secretary relied upon to remove or transfer the appellant (normally referred to as the "response file").
- (d) The name and contact information of the agency's representative for any appeal filed with the MSPB under this part.

(e) Notice that MSPB appeals must be filed with the appropriate Board regional or field office. See § 1201.4(d) of this chapter.

§ 1210.6 Electronic filing procedures; expedited filing procedures.

(a) *Required use of MSPB e-filing system.* All parties must electronically file all pleadings and documents listed in 5 CFR 1201.14(b) by using the MSPB's e-filing system (e-Appeal Online). An attempt to file an appeal using any other method will result in rejection of the appeal and will not constitute compliance with the 7-day filing deadline under the Act, except in the limited circumstances described in §1210.7(c).

(b) *Expedited filing and service requirements.* All documents and pleadings not otherwise covered in paragraph (a) of this section must be filed in accordance with any expedited filing and service procedures ordered by the administrative judge.

(c) The parties should frequently check the Repository on e-Appeal Online to ensure that they are aware of new pleadings, orders and submissions in a timely fashion. A party's failure to check for updates on e-Appeal Online may lead to a denial of a request to extend a deadline and/or the imposition of sanctions.

§ 1210.7 Filing an appeal and a response to an appeal.

(a) *Place for filing an appeal and a response.* Appeals, and responses to those appeals, must be filed with the appropriate Board regional or field office. See § 1201.4(d) of this chapter.

(b) *Time for filing an appeal and agency response.* An appeal of an action taken pursuant to 38 U.S.C. 713 must be filed no later than 7 days after the effective date of the removal or transfer being appealed. (38 U.S.C. 713(d)(2)(B)). An agency response must be filed within 3 days of the filing of the appeal.

(c) *Timeliness of appeals.* If an appellant does not submit an appeal within 7 days of the effective date of the action it will be dismissed as untimely filed. This deadline cannot be extended for any reason. (38 U.S.C. 713(d)(2)(B)). However, if an appellant establishes that he or she attempted to file an appeal using e-Appeal Online within the 7-day deadline and that the filing was unsuccessful due to a problem with e-Appeal Online, the administrative judge may deem the filing to have been completed on the date it was attempted, provided the appellant took reasonable steps to immediately advise the MSPB of the failed attempt to file the appeal using e-Appeal Online. The 21-day deadline for issuance of a decision will commence on the day such an appeal was deemed to have been filed.

(d) Time limits for other appeals not brought under 38 U.S.C. 713.

The time limit prescribed by paragraph (b) of this section for filing an appeal does not apply where a law or regulation establishes a different time limit or where there is no applicable time limit. No time limit applies to appeals under the Uniformed Services Employment and Reemployment Rights Act (Pub. L. 103-353), as amended; see part 1208 of this chapter for the statutory filing time limits applicable to appeals under the Veterans Employment Opportunities Act (Pub. L. 105-339); see part 1209 of this chapter for the statutory filing time limits applicable to whistleblower appeals and stay requests.

§ 1210.8 Stay requests.

An administrative judge may not grant a stay request in any appeal covered by this part. (38 U.S.C. 713(e)(4)).

§ 1210.9 Disclosures of information required with initial appeal.

An appellant must attach to his or her appeal a copy of the agency's decision notice and the response file that the agency is required to disclose to the appellant pursuant to § 1210.5(c).

§ 1210.10 Representatives.

Motions challenging the designation of a representative must be filed within 3 days of the submission of the designation of representative notice.

§ 1210.11 Initial status conference; scheduling the hearing.

This regulation contains guidance for the parties concerning when initial status conferences will occur and the issues that will be addressed. In any appeal under this part the administrative judge retains complete discretion in deciding when to schedule the initial status conference and in selecting the issues to be addressed.

(a) *Scheduling the conference.* The administrative judge will schedule the initial status conference. Generally, the parties should expect that the initial status conference will take place within a week after the appeal is filed.

(b) *Issues likely to be addressed at the initial status conference.* The parties should be prepared to discuss the following issues at the initial status conference:

- (1) The hearing date and anticipated length of the hearing;
- (2) Settlement;
- (3) Discovery deadlines and disputes;
- (4) Admission or rejection of exhibits;

- (5) Witnesses to be called to testify at the hearing;
- (6) Motions; and,
- (7) Any other issues identified by, or that require the involvement of, the administrative judge.

(c) *Additional status conferences.* The administrative judge may schedule additional status conferences as necessary to fully develop the case for hearing.

§ 1210.12 Discovery.

Except as noted in paragraphs (a) through (d) of this section, 5 CFR 1201.71 through 1201.75 apply to appeals filed under this part.

(a) *Initial disclosures.* The parties must make the following initial disclosures prior to the initial status conference.

(1) *Agency.* The agency must provide:

(i) A copy of all documents in the possession, custody or control of the agency that the agency may use in support of its claims or defenses; and,

(ii) The name and, if known, address, telephone number and email address for each individual likely to have discoverable information that the agency may use in support of its claims or defenses.

(2) *Appellant.* The appellant must provide:

(i) A copy of all documents in the possession, custody or control of the appellant that the appellant may use in support of his or her claims or defenses; and,

(ii) The name and, if known, address, telephone number and email address for each individual likely to have discoverable information that the appellant may use in support of his or her claims or defenses.

(b) *Time limits.* The time limits set forth in §1201.73 of this chapter shall not apply to an appeal under this part. The following time limits apply to appeals under this part:

(1) Discovery requests must be served on the opposing party prior to the initial status conference.

(2) Responses to discovery requests must be served on the opposing party no later than 3 days after the initial status conference.

(3) Discovery motions, including motions to compel, must be filed no later than 5 days after the initial status conference.

(c) *Methods of discovery.* Parties may use one or more of the following methods of discovery provided under the Federal Rules of Civil Procedure:

(1) Written interrogatories;

(2) Requests for production of documents or things for inspection or copying;

(3) Requests for admissions.

(d) *Limits on discovery requests.* Absent approval by the administrative judge, discovery is limited as follows:

(1) Interrogatories may not exceed 10 in number, including all discrete subparts;

(2) The parties may not take depositions; and

(3) The parties may engage in only one round of discovery.

(e) *Administrative judge's discretion to alter discovery procedures.*

An administrative judge may alter discovery procedures in order to provide for the expedited review of an appeal filed under this part.

§ 1210.13 Deadlines for filing motions.

(a) *Motions.* All non-discovery motions must be filed no later than 5 days after the initial status conference.

(b) *Objections.* Objections to motions must be filed no later than 2 days after the motion is filed.

(c) *Administrative judge's discretion to alter deadlines.* An administrative judge may exercise discretion to alter or waive these deadlines.

§ 1210.14 Sanctions for failure to meet deadlines.

Section 1201.43 of this chapter, which allows administrative judges to impose sanctions on parties that do not comply with orders or do not file pleadings in a timely fashion, shall apply to any appeal covered by this part. Strict enforcement of deadlines will be required to meet the 21-day deadline for issuance of a decision by the administrative judge.

§ 1210.15 Agency duty to assist in expedited review.

(a) As required by 38 U.S.C. 713(e)(6), the agency is required to provide the administrative judge such information and assistance as may be necessary to ensure that an appeal covered by this part is completed in an expedited manner.

(b) The agency must promptly notify the MSPB whenever it issues a Secretarial determination subject to appeal under this part. Such notification must include the location where the employee worked, the type of action taken, and the effective date of the action. Notification should be sent to VASES@mspb.gov.

1210.16 Intervenors and amici curiae.

Intervenors and amici curiae are permitted to participate in proceedings under this part as allowed in §1201.34 of this chapter. Motions to intervene and requests to participate as an amicus curiae

must be filed at the earliest possible time, generally before the initial status conference. All intervenors and amici curiae must comply with the expedited procedures set forth in this part and all orders issued by the administrative judge. The deadlines applicable to the timely adjudication of cases under this part will not be extended to accommodate intervenors or amici curiae.

§ 1210.17 Hearings.

(a) *Right to a hearing.* An appellant has a right to a hearing as set forth in 5 U.S.C. 7701(a).

(b) *General.* Hearings may be held in-person, by video or by telephone at the discretion of the administrative judge.

(c) *Scheduling the hearing.* The administrative judge will set the hearing date during the initial status conference. A hearing generally will be scheduled to occur no later than 18 days after the appeal is filed.

(d) *Length of hearings.* Hearings generally will be limited to no more than 1 day. The administrative judge, at his or her discretion, may allow for a longer hearing.

(e) *Court reporters.* The MSPB will contract for a court reporter to be present at hearings.

§ 1210.18 Burden of proof, standard of review, and penalty.

(a) *Agency.* Under 5 U.S.C. 7701(c)(1), and subject to exceptions stated in paragraph (c) of this section, the agency (the Department of Veterans Affairs) bears the burden of proving that an appellant engaged in misconduct, as defined by 38 U.S.C. 713(g)(2), or poor performance, and the Secretary's determination as to such misconduct or poor performance shall be sustained only if the factual reasons for the charge(s) are supported by a preponderance of the evidence. Proof of misconduct or poor performance shall create a presumption that the Secretary's decision to remove or transfer the appellant was warranted. The appellant may rebut this presumption by establishing that the imposed penalty was unreasonable under the circumstances of the case. The following examples illustrate the application of this rule:

Example A. The Secretary determines that the appellant intentionally submitted false data on the agency's provision of medical care and that the misconduct warrants transfer to a General Schedule position. The appellant files an appeal with the Board. Following a hearing, the administrative judge finds that the agency proved its charge by preponderant evidence. The appellant's transfer is presumed to be

warranted, absent a showing that such a penalty was unreasonable under the circumstances of the case.

Example B. The Secretary determines that the appellant's performance or misconduct warrants removal, but the notice of the decision and the agency's response file do not identify any factual reasons supporting the Secretary's determination. The appellant files an appeal with the Board. The administrative judge may not sustain the removal because the agency, in taking its action, provided no factual reasons in support of its charge(s).

Example C. The Secretary determines that the appellant's performance or misconduct warrants removal. The appellant files an appeal with the Board. During the processing of the appeal, the appellant contends that the agency unduly delayed or refused to engage in discovery. If the agency has obstructed the appeal from being adjudicated in a timely fashion, the administrative judge may impose sanctions, up to and including the drawing of adverse inferences or reversing the removal action. Because the administrative judge finds that the agency has not unduly delayed or refused to engage in discovery, he declines to impose sanctions and affirms the removal.

Example D. The Secretary decides to remove the appellant based on a charge that the appellant engaged in a minor infraction that occurred outside the workplace. The appellant files an appeal with the Board. Following a hearing, the administrative judge finds that the agency proved its charge and further finds that the appellant established that the penalty of removal was unreasonable under the circumstances of the case. The presumption that the Secretary's decision to remove was warranted is rebutted and the action is reversed.

(b) *Appellant.* The appellant (a career member of the agency's Senior Executive Service corps) has the burden of proof, by a preponderance of the evidence, concerning:

- (1) Issues of jurisdiction;
- (2) The timeliness of the appeal; and
- (3) Affirmative defenses.

(c) *Affirmative defenses.* Under 5 U.S.C. 7701(c)(2), the Secretary's determination may not be sustained, even where the agency met the evidentiary standard stated in paragraph (a) of this section, if the appellant shows that:

- (1) The agency, in rendering its determination, committed harmful error in the application of its procedures;

(2) The decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) The determination is not otherwise in accordance with law.

(d) *Penalty review.* As set forth in paragraph (a) of this section, proof of the agency's charge(s) by preponderant evidence creates a presumption that the Secretary's decision to remove or transfer the appellant was warranted. An appellant may rebut this presumption by establishing that the imposed penalty was unreasonable under the circumstances of the case, in which case the action is reversed.

However, the administrative judge may not mitigate the Secretary's decision to remove or transfer the appellant.

§ 1210.19 Bench decisions.

(a) *General.* The administrative judge may issue a bench decision at the close of the hearing. A bench decision is effective when issued.

(b) *Transcription of bench decision.* A transcribed copy of the decision will be prepared by the court reporter under the administrative judge's supervision to memorialize the oral decision.

The official issuance of a bench decision is the date the administrative judge announces the decision and not the date the administrative judge signs the transcription.

§ 1210.20 Effective date of a decision issued by an administrative judge; continuing jurisdiction over certain ancillary matters.

- (a) A decision by an administrative judge under this part will be effective upon issuance.
- (b) Pursuant to 38 U.S.C. 713(e)(2), a decision by the administrative judge is not subject to further appeal.
- (c) A decision by the administrative judge is nonprecedential. Such a decision may be cited as persuasive authority only in an appeal filed pursuant to 38 U.S.C. 713(e)(2). Such a decision may not be cited in any appeal not filed pursuant to 38 U.S.C. 713(e)(2).
- (d) Following issuance of a decision by the administrative judge under this part, the MSPB retains jurisdiction over the appeal covered by this part for purposes of the following ancillary matters:
 - (1) *Enforcement of decisions and orders.* The procedures set forth in subpart F of 5 CFR part 1201 are applicable to petitions for enforcement filed after the administrative judge issues a decision in an appeal filed under this part; and,
 - (2) *Attorney fees, witness fees, litigation expenses, and damages.* The procedures set forth in subpart H of 5 CFR part 1201 (attorney fees, costs, expert witness fees, and litigation expenses, where applicable,

and damages) are applicable to requests for fees and damages filed after the administrative judge issues a decision in an appeal filed under this part. (5 U.S.C. 7701(g)).

William D. Spencer,

Clerk of the Board.

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